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2 Pre-Trial Conference [Adversary Case No. 11-01681, Giddens v.
3 Citibank, N.A.]

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5 Presentment of Order Establishing Briefing and Hearing Schedule
6 [Adversary Case No. 11-01540, Kathleen Arnold and Timothy A.
7 Cotten v. Lehman Brothers Holdings Inc.]

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10 Aurora Bank FSB's Motion to Dismiss Adversary Complaint
11 [Adversary Case No. 11-01353 The Brooklyn Hospital Center v.
12 Aurora Bank FSB f/k/a Lehman Brothers Bank FSB]

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25 Transcribed by: Dena Page

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20 ALSO PRESENT:

21 KATHLEEN ARNOLD, Party Pro Se (Telephonically)

22 TIMOTHY COTTEN, Party Pro Se (Telephonically)

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1 P R O C E E D I N G S

2 THE COURT: I think the first matter for the afternoon
3 calendar is Giddens v. Citibank.

4 MR. MENAKER: Good afternoon, Your Honor. Richard
5 Menaker, special counsel to the trustee, 10 East 40th Street,
6 New York, 10016.

7 THE COURT: Okay. I'll take other appearances, as
8 well.

9 MR. SHIMSHAK: Good afternoon, Your Honor. Steve
10 Shimshak, Paul, Weiss, for Citibank.

11 MS. HAMMERMAN: Claudia Hammerman, also Paul, Weiss,
12 for Citibank.

13 THE COURT: Okay, I know this is a case that already
14 has a scheduling order, but we haven't had a pre-trial. Are
15 things going well? Do you need an adjustment to the order? I
16 know that there's some things to happen, I think it's on May
17 26th.

18 MR. MENAKER: This matter's been handled cooperatively
19 from the word go. In fact, the parties cooperated long before
20 we ever filed. The principals had discussions, there was much
21 amicable communication over a possible resolution. There are
22 some intellectual issues that are going to require rulings.
23 We're sorry we have to be here for that, but I'm pleased to be
24 able to report that all has gone smoothly, it continues to go
25 smoothly, and we don't see any need for judicial intervention.

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1 Certainly to date, we haven't had any need for judicial
2 intervention and don't see any need for the near future.

3 May 26th is going to be the initial motion date;
4 that's when opening papers will be served. The trustee will
5 serve his papers at the beginning of August. Reply comes in in
6 September. So there's an extended period where we will be
7 teeing up the issues for the Court's consideration. In the
8 meantime, discovery proceeds on a cooperative basis. We're
9 meeting and conferring even before objections have been issued
10 to see if we can narrow things and get those aspects worked
11 out.

12 If a further settlement conference seems
13 appropriate -- or, sorry, if a further status conference,
14 rather, seems appropriate, we will contact chambers, set it up
15 for a Lehman regular date, but at this point, it may be we
16 won't have to be before the Court until the motion has already
17 been presented. And that's really all I have.

18 THE COURT: Okay. I don't want too much of a preview,
19 but given the communications that you've described as being
20 quite excellent and the fact that there may be some issues that
21 you describe as intellectual ones, can you give me a preview as
22 to what kinds of issues you anticipate will be presented for
23 judicial determination?

24 MR. MENAKER: Sure. The broker-dealer is a creditor
25 of Citibank and certain of its affiliates in virtue of the fact

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1 that it had big deposits with Citibank here, all over the
2 world. And at the time of filing, there was a billion dollars
3 in a single account and there were deposits in many parts of
4 the world in excess of 360 million dollars. At the same time,
5 Citibank has been a creditor as a service provider to the
6 broker-dealer, largely, or primarily in the basis of the fact
7 that it was providing a kind of service, a payment
8 administrative service or settlement service in the continuous
9 linked settlement process for handling foreign exchange. This
10 is that program that was developed in order to avoid the
11 Herstatt issues and has been in place for about a decade. So
12 Citibank was our settlement member with the CLS bank
13 administering payments.

14 On September 15th, Citibank -- this is 2008, of
15 course, Citibank terminated its service agreement with LBI and
16 then, being pleaded for on bended knee that it continue this,
17 said, well, you've got to deposit a billion dollars with us.
18 And a billion-dollar deposit was set up of very much-needed
19 funds, but it was put in Citibank's hands, and Citibank
20 continued administering the CLS settlement. By the end of the
21 week, an indebtedness had emerged in connection with these
22 services, and at the time of filing, there was -- and we would
23 submit, after filing, there was a setoff of that billion
24 dollars and a freeze on the 300 million-plus in the various
25 accounts around the world. And this adversary proceeding is an

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1 effort by the trustee to reclaim those deposited funds.

2 There are some other types of issues -- claims between
3 the parties that are in the single-digit millions or tens of
4 millions and are relatively small compared to the big CLS
5 issues. We know that Citibank's view of this is that it has a
6 right of triangular setoff. We know that Citibank is taking a
7 position that the CLS services that it was providing was safe-
8 harbored, so they're going to make safe harbor insulation
9 arguments. They may make other arguments in their motion;
10 obviously, it hasn't come in yet. But it's -- the kinds of
11 issues that will be presented to the Court will be, to some
12 degree, familiar issues from other proceedings, and the Court
13 will also want to know about CLS and how CLS works, how that
14 settlement process works. And I think some of that will be
15 fact-intensive and some of it will involve applying some basic
16 principles of bankruptcy law to a field of commerce which has
17 not been heavily litigated. In fact, we've had difficulty
18 finding anything where CLS has actually been ruled upon by any
19 courts.

20 THE COURT: All right, as a result of that, Mr.
21 Shimshak, do you want to say a few words?

22 MR. SHIMSHAK: Yeah, I do want to say a few words.
23 First, I wanted to say that Mr. Menaker has accurately
24 characterized the relationship that we've had in the past many
25 months as we've tried to work through the issues, but they've

1 culminated in our being here before you in this adversary
2 proceeding.

3 He is correct that we will be filing a motion to
4 dismiss on the 26th. That motion to dismiss -- and here I
5 deviate from his account -- it will not be dependent on
6 additional facts because it's a motion to dismiss. It's going
7 to be based on the allegations of the complaint. And we
8 believe that based on those allegations, we will be able to
9 demonstrate to your satisfaction the application of the safe
10 harbors to the CLS relationship that Citi had with Lehman
11 Brothers Inc.

12 In addition, the complaint contains more traditional
13 avoidance claims, those focusing in Section 544, 548, 547, and
14 the like. We believe that those claims as pled are deficient
15 on their face, and we'll be moving to dismiss those claims.

16 I wanted to alert the Court to one other thing which I
17 don't think is covered by the agreed order. There have been a
18 series of stipulations that we've executed since the beginning
19 of the case with LBI, rolling forward, our obligation to seek
20 relief from the automatic stay as to some of these remaining
21 accounts. We do have a one billion dollar setoff which we
22 maintain we took before the petition date, though for purposes
23 of the application of the safe harbors, it doesn't really
24 matter whether it was before or after, but in contrast to Mr.
25 Menaker, we believe through appropriate judicial notice, we can

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1 demonstrate that it occurred before the petition date.

2 But then there are accounts where we have not
3 exercised our right of setoff, as yet. We believe those, too,
4 are within the safe harbor protection, and with the advent of
5 the litigation, we are obligated, now, to seek relief from the
6 stay to effectuate those remaining setoffs. So while he seeks
7 the turnover of the accounts, we seek, correspondingly, to
8 exercise rights of setoff against them. We will be filing, in
9 addition to our motion to dismiss, a separate motion on that
10 date, on the 26th of May.

11 Now, to give you a preview of where we see this going
12 procedurally, because the issues are ultimately so intertwined,
13 we propose that that matter move in companionship with this
14 matter and that ultimately the adjudication of the rights in
15 the accounts and our rights of setoff are all of a piece and
16 thus, on the face of the motion, you will see that while we
17 have the statutory right under Section 362 to have this matter
18 heard after sixty days, we are prepared to continue that in
19 companionship with the underlying adversary proceeding.

20 THE COURT: Would there be a stipulation or some other
21 writing that will evidence what you just said?

22 MR. SHIMSHAK: We haven't gotten to that point.
23 Frankly, the issues surrounding the adversary proceeding
24 presented their own complexity in terms of putting those two
25 things together because the adversary proceeding was a separate

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1 litigation, as is the stay relief motion. So when we meet and
2 confer, our hope is that we can work out a satisfactory order,
3 I predict immediately after the motion is filed. But I don't
4 anticipate, given the relationship that we've had with Mr.
5 Menaker's firm, that we're going to have any difficulty in
6 reaching an accommodation.

7 THE COURT: Fine. I appreciate your bringing all this
8 to my attention. Is there anything more?

9 Fine.

10 MR. MENAKER: No, Your Honor, except that I agree as
11 far as working out the stipulation, that I'm sure we'll have no
12 problems on that.

13 THE COURT: I rather guess that the next time that
14 I'll see you will be an argument in connection with a motion to
15 dismiss.

16 Okay, fine.

17 MR. MENAKER: May we be excused, Your Honor?

18 THE COURT: You may be excused.

19 MR. MENAKER: Thank you, Your Honor.

20 THE COURT: Thank you.

21 The next matter is the Kathleen Arnold and Timothy
22 Cotten adversary proceeding against Lehman Brothers Holdings.
23 I understand that Kathleen Arnold is on the telephone or was
24 scheduled to be on the telephone.

25 MS. ARNOLD: Yes, Your Honor.

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1 THE COURT: Is Mr. Cotten available, as well?

2 MS. ARNOLD: Yes, he is.

3 THE COURT: Is he also on --

4 MS. ARNOLD: Go ahead and speak to the judge.

5 THE COURT: I'm sorry?

6 MR. COTTEN: Good afternoon, Your Honor.

7 THE COURT: All right, fine.

8 Let's proceed.

9 MS. MARCUS: Good afternoon, Your Honor. Jacqueline
10 Marcus from Weil, Gotshal & Manges on behalf of Lehman Brothers
11 Holdings Inc. and its affiliated debtors, as well as Aurora
12 Bank.

13 We're here, Your Honor, on the debtors' notice of
14 presentment of order establishing briefing and hearing schedule
15 in the adversary number 11-1540. At the last hearing, which
16 was a pre-trial conference, the parties, with the help of the
17 Court, agreed upon a briefing schedule. The debtors prepared
18 the form of order and tried to get Ms. Arnold and Mr. Cotten to
19 agree to the form of the order. When we were unable to get
20 their agreement, we filed a notice of presentment on April
21 21st. At about the same time, plaintiffs filed an amended
22 complaint.

23 On April 26th, 2011, plaintiffs filed an objection to
24 the form of the order that the debtors had proposed. It's not
25 quite clear whether plaintiffs object that LBHI is seeking too

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1 much time or not enough time to respond. They seem to believe
2 that LBHI is treading on rights granted to the plaintiffs under
3 the federal rules and ignore the fact that the Court dealt with
4 these issues at the April 13th conference.

5 While it is probably procedurally proper for the
6 debtors to request the Court to enter the order in the form
7 that we filed which we believe accurately reflects the Court's
8 ruling on April 13th, the debtors believe it's more practical
9 to set the briefing schedule in light of the subsequent
10 developments, in particular, the filing of the amended
11 complaint which required LBHI to respond by filing a new motion
12 to dismiss. Thus, without changing the June 15th hearing date,
13 the debtors have suggested that plaintiffs be provided until
14 May 31 to respond to LBHI's motion to dismiss the amended
15 complaint which was filed on May 9th, and the debtors' reply
16 would be due on June 8th, and we would proceed with the hearing
17 on June 15th.

18 The debtors notified the plaintiffs of their
19 intentions on May 11th. The plaintiffs have indicated that
20 they're not in agreement with the proposed schedule, and they
21 want to conduct discovery and have a trial on June 15th.

22 Yesterday, we provided the plaintiffs with the
23 blacklined copy of the proposed pre-trial order. The
24 plaintiffs' position appears to be similar to the argument that
25 they made at the April 13th hearing, and as indicated on the

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1 transcript of the April 13th hearing, the plaintiffs are
2 required to respond to the motion and discovery is not
3 appropriate at this point. As a result, the debtors request
4 that the Court enter the revised pre-trial order and require
5 the plaintiffs to respond to the motion to dismiss by May 31.

6 THE COURT: Okay. Well --

7 MS. MARCUS: I have a marked up order.

8 THE COURT: I'll take a look at the order. I want to
9 give Ms. Arnold and Mr. Cotten an opportunity to respond. But
10 I'd like to make a couple of points before I hear from them.

11 First of all, I have looked at the papers that have
12 been filed of record, including the amended complaint and the
13 renewed and modified motion to dismiss filed by LBHI. There is
14 also a pleading that was filed this week which I have not had a
15 chance to read in full detail, but I have reviewed it to get an
16 understanding of generally what's being asserted, although I
17 must admit, I don't entirely understand it, which is a pleading
18 by the plaintiffs seeking some form of expedited relief. And
19 it is not clear to me why that was filed and what relief was
20 being sought. But it seems to me that that's a separate matter
21 unless the plaintiffs can demonstrate that it connects to the
22 proposed briefing schedule.

23 So my first question for Kathleen Arnold is to explain
24 the purpose of the filing that was made this week and whether
25 or not there is a request that that matter be combined in some

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1 fashion or another with the briefing in respect of the motion
2 to dismiss. It seems to me that it's a separate matter, but I
3 can't tell.

4 MS. ARNOLD: Your Honor, you're correct, it is. Thank
5 you. It is a separate matter, and probably what I'm seeking
6 from what I can understand will be a process here is that that
7 would be heard at the June 15th hearing.

8 THE COURT: Okay, well, I'm not sure we're going to
9 have a hearing on June 15th --

10 MS. ARNOLD: Okay.

11 THE COURT: -- yet. We haven't scheduled that. One
12 of my concerns -- and I mentioned this last month -- is that
13 the issues that are being presented by LBHI in their motions to
14 dismiss are fundamentally questions of bankruptcy jurisdiction.
15 And as a consequence, generally speaking, it takes an
16 experienced bankruptcy lawyer to comprehend and deal with these
17 issues. And for that reason, I'm going to reiterate what I
18 said last month which is that I think even though you have said
19 you don't have the financial ability to engage counsel, it
20 would be desirable if you could at least seek out pro bono
21 counsel. And I am aware, just from having checked the web
22 sites in Baltimore, that there are a variety of services
23 comparable to those that are available in New York to provide
24 legal services at no charge to individuals who can't afford
25 private counsel.

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1 I'd like to ask whether or not you've given any
2 thought to engaging pro bono counsel to assist you in this
3 matter.

4 MS. ARNOLD: Yes, Your Honor, we have, and as a matter
5 of fact, we've taken it a step further and tried to engage
6 counsel within the last two weeks. But we will -- we have not,
7 with earnest -- the last time that we tried to engage pro bono
8 counsel was probably a couple years ago in Baltimore. We have
9 not tried that since our last meeting or conference but will do
10 that.

11 THE COURT: Okay, well, it's partly for that reason
12 that I'm not sure that this schedule is the schedule that we
13 should be following. I'd like to give the plaintiffs what
14 amounts to one last opportunity to get counsel involved. And
15 frankly, and I'm just going to tell you this because I've
16 reviewed the papers, I believe that if counsel were involved in
17 this matter, that counsel might advise the plaintiffs that they
18 have a serious jurisdictional problem, and as a result, so much
19 of the effort which is going into the bankruptcy case might be
20 expended elsewhere. That's not to say that I have prejudged
21 this, but the issues raised in the two motions to dismiss in
22 connection with subject matter jurisdiction would be very
23 difficult to rebut, and that's one of the reasons why I think
24 it's important that a lawyer be involved. This is
25 fundamentally a question of whether proper claims can be made

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1 based upon the facts as I understand them against Lehman
2 Brothers Holdings Inc., the ultimate parent of Aurora. And
3 that will be very challenging because there is separate
4 corporate status and Aurora is not a debtor in this court.

5 So before we get into scheduling, it seems to me that
6 these plaintiffs need sound legal advice. And I can tell from
7 what I've read that they feel aggrieved, aggrieved by facts and
8 circumstances that go back perhaps eight years. I also
9 understand based upon my review of the papers, that these
10 plaintiffs have been involved in litigation in state court, in
11 federal court, and in bankruptcy court in Maryland and are now
12 seeking relief here. And all of this litigation suggests that
13 these individual plaintiffs are experienced when it comes to
14 what goes on in court, but by their own admission, do not have
15 the kind of legal training and knowledge to be able to
16 understand some of the sophisticated legal theories that are
17 being advanced by the debtor.

18 So I think step one in this process is for the
19 plaintiffs to renew their efforts to retain counsel. But that
20 can't be an open-ended opportunity. It seems to me that
21 between now and, say, June 15, there might be an opportunity to
22 engage counsel, and you'll either be successful or unsuccessful
23 in that effort. And that once counsel has been engaged,
24 counsel might either choose not to pursue this litigation or
25 identify legal arguments that I haven't considered, and papers

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1 should be filed in opposition to the motion to dismiss. For
2 that reason, I think that a better schedule would be a hearing
3 in July at the July omnibus hearing, instead of in June, and
4 the subject matter of that hearing would be purely the question
5 of subject matter jurisdiction. There will not be an
6 evidentiary hearing that relates to the facts and circumstances
7 that involved the property that was owned by these plaintiffs,
8 but rather whether or not their original complaint and amended
9 complaint assert claims that are cognizable in this bankruptcy
10 case.

11 MS. ARNOLD: Thank you, Your Honor.

12 THE COURT: I think the parties should once again try
13 to work out a deadline consistent with this timeline for the
14 submission of papers in opposition to the motion to dismiss.
15 And if the parties can't do that, I'm going to make a
16 suggestion. And that suggestion is -- and I don't have the
17 date of the July hearing in mind. Do you have that date?
18 Let's see if we can find that date, so we can tie this to
19 actual --

20 MS. MARCUS: Your Honor, I think it may be July 20th,
21 but I'll know in a minute.

22 THE COURT: Is it July 20th?

23 MS. MARCUS: I don't know yet. Technical
24 difficulties.

25 THE COURT: Let's see if anybody on my side knows.

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1 It looks like it's July 20th. So if July 20th is the
2 date of the omnibus hearing, I think we should back up about
3 ten days from that, and that it would be reasonable for papers
4 in opposition to the motion to dismiss no later than the close
5 of business on July 8th, and it would be responsible for any
6 further reply in support of the motion to be made by no later
7 than the close of business on July 15th.

8 MS. MARCUS: That's fine, Your Honor. I take it we're
9 just going to that timeline, rather than trying to work it out
10 amongst ourselves. That's the debtors' preference.

11 THE COURT: If you can work it out amongst yourselves,
12 that's fine, but if you can't, I've spoken --

13 MS. ARNOLD: That's fine.

14 THE COURT: -- in terms of the dates. I've just come
15 to the conclusion that it's hard to reach agreement, and for
16 that reason, I'm simply imposing some discipline on the process
17 by proposing dates.

18 MS. MARCUS: I appreciate that, Your Honor.

19 THE COURT: Okay.

20 MS. ARNOLD: Thank you.

21 THE COURT: So and I think it would really be helpful
22 to the plaintiffs to get a lawyer. I can't vouch for either of
23 these organizations, but my chambers staff found two names and
24 numbers just by looking online. One is Maryland Volunteer
25 Lawyer Services --

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1 MS. ARNOLD: Okay.

2 THE COURT: -- and the other is Civil Justice,
3 Incorporated. I have no idea if these are good groups --

4 MS. ARNOLD: We understand.

5 THE COURT: -- but they may be helpful. The phone
6 number of the first is 410-547-6537. The phone number of the
7 second is 410-706-0174.

8 MS. ARNOLD: Thank you.

9 THE COURT: I would also suggest that you might place
10 a call to the Baltimore Bar Association and speak to people
11 there about their business bankruptcy committee -- I'm sure
12 they have one -- and there might be people within that group
13 who could be helpful to you.

14 MS. ARNOLD: Thank you, Your Honor.

15 THE COURT: Okay.

16 MS. ARNOLD: We appreciate it.

17 THE COURT: All right.

18 MS. ARNOLD: Have a good day, now.

19 THE COURT: The next matter is Brooklyn Hospital
20 Center v. Aurora Bank. And we have a similar issue.

21 MS. MARCUS: Yes, we do, Your Honor.

22 MR. GOTTLIEB: Good afternoon, Your Honor. Lawrence
23 Gottlieb, Hass & Gottlieb, on behalf of Brooklyn Hospital
24 Center.

25 THE COURT: Okay.

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1 MS. MARCUS: Your Honor, Jacqueline Marcus, again, on
2 behalf of Aurora Bank.

3 Brooklyn Hospital -- we're here today on Aurora Bank's
4 motion to dismiss the complaint for lack of subject matter
5 jurisdiction. Brooklyn Hospital Center filed the complaint
6 against Aurora seeking a determination of the extent, validity,
7 and priority of a mortgage lien ostensibly held by Aurora. To
8 refresh the Court's recollection, Aurora is not one of the
9 debtors in these cases. Aurora is not even a subsidiary of one
10 of the debtors, although that wouldn't really matter. Rather,
11 Aurora is a subsidiary of Lehman Brothers Bank Corp., Inc., a
12 nondebtor subsidiary of LBHI.

13 Based on the fact that the action was commenced
14 against the nondebtor, Aurora filed the motion to dismiss
15 pursuant to Federal Rule of Civil Procedure 12(b)(1) and
16 Federal Bankruptcy Rule 7012(b). As set forth in Aurora's
17 motion and again in its reply, under Section 1334(b), this
18 Court has subject matter jurisdiction over all civil proceeding
19 arising under Title 11 or arising in or related to cases under
20 Title 11. The incident adversary proceeding is none of those.

21 In its complaint, Brooklyn Hospital Center alleges, in
22 effect, that the assets of Aurora are the assets of LBHI, and
23 therefore, are property of the estate. That position is
24 squarely at odds with the Second Circuit's decision in *In re:*
25 *Beck Industries, Inc.*, 479 F.2d 410. In Beck, the Second

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1 Circuit held, and I quote, "Ownership of all of the outstanding
2 stock of a corporation, however, is not the equivalent of
3 ownership of a subsidiary's property or assets." That's at 479
4 F.2d at 415. As Brooklyn Hospital Center notes, Beck was
5 decided prior to the enactment of the Bankruptcy Code.
6 However, several cases have already held that the reasoning of
7 Beck applied equally to jurisdiction under the Bankruptcy Code,
8 and I refer the Court to the Mayco and Tower order decisions in
9 this Court, as well as the Windstar case in the Delaware
10 Bankruptcy Court.

11 Moreover, the ramifications of the interpretation of
12 related to jurisdiction advocated by Brooklyn Hospital Center
13 would be profound. Basically, this Court would have subject
14 matter jurisdiction over every dispute regarding any asset
15 belonging or ostensibly belonging to any of the debtors' more
16 than 1,000 active nondebtor subsidiaries. That simply can't be
17 the right answer and would make administration of these cases
18 even more impossible than it already is.

19 An additional reason that the Court lacks subject
20 matter jurisdiction over this dispute is that the debtors'
21 nondebtor subsidiaries no longer even own an interest in the
22 loan that is the subject of the dispute. In support of its
23 motion to dismiss, Aurora filed a declaration of Daniel Glanz
24 (ph.), a vice president, portfolio management, at LAMCO, LLC.
25 Mr. Glanz is present in court this afternoon. In his

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1 declaration, Mr. Glanz explains that the loan was sold by
2 Aurora to LBHI, and then by LBHI to Fannie Mae in April of
3 2004. As a result, even if Aurora has no interest in the loan,
4 BHC's premise that the assets of Aurora constitute property of
5 the estate is not even applicable here.

6 In its objection to the motion to dismiss, Brooklyn
7 Hospital makes essentially three points. First, it relies on
8 Celotex Corporation v. Edwards to assert that related to
9 jurisdiction exists here. In Celotex, the Supreme Court quoted
10 with approval the tests set forth in Paycorpor v. Higgins (ph.)
11 as follows: "An action is related to bankruptcy if the outcome
12 could alter the debtors' rights, liabilities, options, or
13 freedom of action either positively or negatively, and which in
14 any way impacts upon the handling and the administration of the
15 bankruptcy estate." The Court went on to note, "But whatever
16 test is used, these cases make clear that bankruptcy courts
17 have no jurisdiction over proceedings that have no effect on
18 the estate of the debtor."

19 The facts in Celotex are instructive and
20 distinguishable from the facts, here. Celotex, the debtor,
21 prior to its petition date, had obtained a supersedeas bond to
22 secure a judgment while it appealed that judgment. To secure
23 its obligation to the insurer, Celotex posted collateral with
24 the insurer. Post-petition, Celotex obtained the Section 105
25 injunction from the bankruptcy court that precluded the

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1 plaintiff in the litigation from executing on the bond. The
2 Supreme Court upheld the subject matter jurisdiction of the
3 bankruptcy court to issue the Section 105 injunction on the
4 basis that the action to execute on the bond was related to
5 Celotex's Chapter 11 case. The distinction is very apparent.
6 If the plaintiff were permitted to enforce the bond, the
7 insurer would have had a secured claim against the debtor. The
8 bankruptcy court, in its determination, had concluded that
9 permitting judgment creditors to execute on their bonds, "would
10 have a direct and substantial adverse effect on Celotex's
11 ability to undergo a successful reorganization."

12 BHC also relies on the Third Circuit's decision in
13 Paycorp v. Higgins. While Paycorp sets for the generally
14 accepted test for related to jurisdiction, it's notable that
15 the Paycorp court found that related to jurisdiction did not
16 exist in that matter. In that case, Paycorp was the defendant
17 in a products liability action. It filed a third-party
18 complaint against Johns-Manville. When Johns-Manville filed
19 for relief under Chapter 11, Paycorp tried to have the entire
20 action removed to the bankruptcy court on the basis of related-
21 to jurisdiction. The Third Circuit noted as a threshold matter
22 that the suit was between two nondebtors, like in this case.
23 As importantly, the Court noted that even though the outcome of
24 the state court action might lead Paycorp to file an
25 indemnification claim against the debtor, Manville, "The

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1 bankruptcy estate could not be affected in any way until the
2 Paycorp/Manville third-party action is actually brought and
3 tried." The court, therefore, held that there was no related
4 to jurisdiction, and the action could not be removed.

5 Here, if Brooklyn Hospital Center prevails in
6 establishing in the state court action that it has a superior
7 interest in the real estate that is the subject of the dispute,
8 it will have no effect on any of the debtors, either directly
9 or indirectly. Thus, there is no related to jurisdiction under
10 the standards articulated in Celotex or Paycorp.

11 Brooklyn Hospital Center's second argument is that
12 Aurora has submitted to the Court's jurisdiction in the past.
13 However, unlike personal jurisdiction, a party cannot consent
14 to subject matter jurisdiction. If a court lacks subject
15 matter jurisdiction, then the matter may not be heard. In
16 addition, Brooklyn Hospital Center misconstrues what has
17 occurred in this court in the past with respect to Aurora. The
18 two proceedings cited by Brooklyn Hospital Center in which no
19 motion to dismiss for lack of subject matter jurisdiction was
20 made, involved actions against Aurora as well as one or more of
21 the debtors in these cases. That is a critical and dispositive
22 difference.

23 Third, Brooklyn Hospital Center contends that the
24 motion to dismiss should not be granted because there is no
25 pending state court proceeding. Aurora has filed a declaration

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1 of Avery S. Mehlman, a partner at Herrick Feinstein, co-counsel
2 to Aurora in the state court action in support of the motion.
3 Mr. Mehlman hoped to participate telephonically because he's
4 tied up in a deposition today, but I'm not sure if he was able
5 to join the hearing.

6 THE COURT: Let's find out. Are you on the line, sir?

7 No response suggests that he's not on the line.

8 MS. MARCUS: I agree. Mr. Mehlman's declaration
9 states that he was present in court on June 16th, 2010 when the
10 state court issued a default judgment granting the motion of
11 Aurora Loan Servicing to reargue. Moreover, whether there is a
12 pending state court proceeding is really irrelevant to the
13 question of the Court's subject matter jurisdiction.

14 For all of the foregoing reasons, Your Honor, the
15 debtors request that the Court grant the motion to dismiss.

16 THE COURT: All right, thank you.

17 MR. GOTTLIEB: Good afternoon, again, Judge. Lawrence
18 Gottlieb.

19 Your Honor, when I was retained by this client,
20 Brooklyn Hospital, they were faced with the collection of a
21 debt that's been due for approximately eight years, and you
22 probably understand from the facts, which aren't particularly
23 germane for purposes of a subject matter jurisdiction dismissal
24 motion. However, the underlying procedural and factual
25 determinations that have to be made are something that jumped

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1 out to me as something that this Court has absolute expertise
2 over, i.e., determining the extent, validity, and priority of a
3 lien. So when I was brought this case and we were going to
4 commence a new action seeking a declaratory judgment as to
5 whether Brooklyn Hospital has superior lien interest, vis-a-vis
6 this property, we looked through the file and saw, among other
7 things, Mr. Mehlman, the self-same Mr. Mehlman who isn't here
8 today, had written a letter in June 2009, and that's appended
9 as Exhibit G to our opposition. Mr. Mehlman said, post the
10 commencement of the foreclosure proceeding, post the filing of
11 the Lehman bankruptcy, and I quote his letter of June 22, 2009,
12 in part, he says to Mr. Tamsen who's special real estate
13 counsel to Brooklyn Hospital, "As you are aware, Herrick
14 Feinstein represents Lehman Brothers Bank, FSB, the holder of
15 the note and mortgage encumbering the above-referenced
16 property." Your Honor, I know as a bankruptcy practitioner,
17 when I'm faced with that kind of representation and the
18 potential to run afoul of the automatic stay, I'm not going to
19 risk commencing an action in state court without either moving
20 to lift the stay or alternatively, which seemed to me the
21 better alternative, again, counting on this Court's expertise
22 in this matter -- this type of matter to commence an adversary
23 proceeding where this Court could ultimately determine the
24 extent and validity and priority of the lien held by Aurora
25 Bank which Mr. Mehlman represented was actually a mortgage held

1 by Lehman Brothers Bank. And that's what brought us here
2 today, Judge.

3 THE COURT: Well, whether it's Aurora or Lehman
4 Brothers Bank, and I believe Aurora is simply Lehman Brothers
5 Bank, renamed, that entity is not a debtor here.

6 MR. GOTTLIEB: I understand, Judge, and we've been
7 made very well aware of that. And again, based on my
8 experience and fearing running afoul of the automatic stay, we
9 didn't want to take the shot at prosecuting a new state court
10 litigation. Judge, just by -- tangentially, that state court
11 litigation, if you check the Unified Court System screenshot,
12 it shows -- and it's appended to our papers -- that the case is
13 marked disposed. That's the only written determination on
14 file. It shows a decision by Judge Starkey of four years ago
15 where he, on his own sua sponte motion, on a routine motion to
16 appoint a referee, determined that Lehman Brothers was out of
17 luck because by virtue of a sheriff sale, it wiped out a junior
18 lien. Now, Judge Starkey may have been wrong, he may have been
19 right, and ultimately, Mr. Mehlman brought a motion to reargue,
20 and it was granted on default. There's no paper memorializing
21 that determination; in fact, that determination took place --
22 we're coming up on the year anniversary, and it sounds like,
23 based on the motion papers, as well as the reply, that that's
24 something that's going to be starting up again, and
25 unfortunately, Brooklyn Hospital's going to have to dig itself

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1 out of a bit of hole in the state court action. As you may
2 have seen in our papers, there was an improper notice of
3 appearance filed by corporation counsel on behalf of Brooklyn
4 Hospital apparently under the false presumption that it was the
5 New York Health and Hospitals Corporation that was being sued.
6 And they filed the notice of appearance and waiver of papers
7 and didn't participate within the confines of that foreclosure
8 proceeding. So I don't believe it's going to concern you, Your
9 Honor, but we're going to have to move for leave to intervene
10 and vacate the default.

11 THE COURT: Well, you have a long-standing dispute
12 relating to the collection of a bill for services rendered to
13 somebody that used to own this piece of property who
14 transferred the property to her daughter who obtained a life
15 tenancy to stay in the property. And your goal here is not to
16 complicate things, but presumably establish whatever rights you
17 can establish in a court of competent jurisdiction, correct?

18 MR. GOTTLIEB: That's correct, Judge, and we felt this
19 was the court of most competent jurisdiction.

20 THE COURT: So having heard the arguments of counsel
21 for Aurora, which I find persuasive, I might add, let's just
22 say for the sake of discussion that I were to dismiss this
23 litigation on the grounds of subject matter jurisdiction, and
24 having heard but not making a finding on the basis of what I've
25 heard, that there is a pending state court litigation that you

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1 could attempt to get involved in to protect your interests or,
2 alternatively, based on what you just said five minutes ago,
3 you could commence another litigation in state court, how is
4 your client aggrieved by virtue of a determination that I make
5 that you don't have -- that there's no subject matter
6 jurisdiction as to this claim against Aurora?

7 MR. GOTTLIEB: Other than the fact that we're going to
8 have to go across the river, Judge, and deal with a state court
9 judge, I don't think we are.

10 THE COURT: Okay. I appreciate your saying that,
11 because that's what I thought. And that's a very good reason
12 to grant the motion to dismiss. The arguments made -- I'm
13 going to give you a chance to make whatever argument you want
14 to make, and I've looked at your papers, but the arguments made
15 by Aurora in this case are compelling.

16 For one, for the last about two and a half years, I
17 have been involved in matters that involve Lehman Brothers
18 Holdings Inc. and its filed and, in some cases, unfiled
19 subsidiaries, one of those being Aurora. And on various
20 occasions, I have approved the advances of capital from the
21 debtors to Aurora to support Aurora's regulatory capital.
22 Throughout that process, and there have been perhaps four or
23 five hearings that have involved the debtors' support of
24 Aurora, it was made very clear to me that Aurora was a
25 nondebtor. And the Lehman entities were supporting Aurora in

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1 reference to protecting their indirect equity investment in
2 that enterprise.

3 I happen to agree with the parade of horribles
4 argument made by Ms. Marcus. If every claim relating to Lehman
5 Brothers Bank, now known as Aurora FSB, were deemed to be a
6 claim related to the administration of the LBHI bankruptcy
7 case, as they said in Jaws, I'm going to need a bigger boat.
8 I'm going to need a much bigger boat. And we couldn't manage
9 that.

10 But more particularly, if you apply the fundamentals
11 of bankruptcy jurisprudence, recognizing that bankruptcy
12 jurisprudence should be interpreted broadly, there is still no
13 conceivable impact that the litigation that you are bringing
14 against Aurora can have on the administration of any of these
15 debtors, and I'm unable to find it. If you can tell me that
16 I'm missing something, this is your chance.

17 MR. GOTTLIEB: Your Honor, without further factual
18 discovery, I'm just not able to do that. And I don't know if I
19 want to spend my client's money engaging some kind of pre-
20 filing discovery. It's just not worth it. So I'm going to, of
21 course, defer to the Court's ruling. I thought under Celotex
22 and given what we perceive to be very broad-based jurisdiction,
23 the Court's ability to assert broad-based jurisdiction, we were
24 hoping that we'd find ourselves in this court. But I
25 understand that when the facts present themselves, that we may

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1 not have a basis for jurisdiction, and of course, we're going
2 to defer to your ruling.

3 THE COURT: Fine. On the basis of this argument and
4 colloquy, I'm granting the motion to dismiss. I will entertain
5 an order consistent with this ruling. And if, by chance, you
6 should decide to appeal this determination, I reserve the right
7 to supplement the statements made on today's record with a
8 written opinion.

9 MR. GOTTLIEB: Your Honor, can we ask that that order
10 be settled.

11 THE COURT: I see no reason why you can't agree on the
12 form of order.

13 MS. MARCUS: Sure, absolutely.

14 MR. GOTTLIEB: Okay, so we'll consensually attempt to
15 do that.

16 THE COURT: That's fine. In that case, I believe we
17 have concluded the afternoon's calendar.

18 MS. MARCUS: I think that's right. Thank you, Your
19 Honor.

20 MR. GOTTLIEB: Thank you, Judge.

21 THE COURT: We are adjourned.

22 (Whereupon these proceedings were concluded at 2:54 PM)

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2 I N D E X

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4 RULINGS

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6 Aurora Bank FSB's Motion to Dismiss Adversary	32	4
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7 Complaint Granted		
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2 C E R T I F I C A T I O N

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4 I, Dena Page, certify that the foregoing transcript is a true
5 and accurate record of the proceedings.

6

7 **Dena Page**

Digitally signed by Dena Page
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Reason: I am the author of this document
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16 Date: May 19, 2011

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